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Supreme Court, U.S.
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IN THE SUPREME COURT

of the

UNITED STATES
October Term 1986

JOHN F. FEGURGUR,
Petitioner,

vs.

PEOPLE OF THE TERRITORY OF GUAM
Respondent.

On Petition For a Writ of Certiorari
To The United States Court of Appeals
For the Ninth Circuit.

Respondent's Brief In Opposition

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STATUTES INVOLVED

48 U.S.C. 1421b. Bill of Rights

(a) No law shall be enacted in Guam respecting an establishment of religion or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition the government for a redress of their grievances.

(b) No soldier shall, in time of peace, be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

(c) The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrant for arrest or search shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized.

(d) No person shall be deprived of life, liberty, or property without due process of law.

(f) Private property shall not be taken for public use without just compensation.

(g) In all criminal prosecutions the accused shall have the right to a speedy and public trial; to be informed of the nature and cause of the accusation and to have a copy thereof; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor,

and to have the assistance of counsel for his defense.

(h) Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

(i) Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted shall exist in Guam.

(j) No bill of attainder, ex post facto law, or law impairing the obligation of contracts shall be enacted.

(k) No person shall be imprisoned for debt.

(l) The privilege of the writ of habeas corpus shall not be suspended, unless, when in cases of rebellion or invasion or imminent danger thereof, the public safety shall require it.

(m) No qualification with respect to property, income, political opinion, or any other matter apart from citizenship, civil capacity, and residence shall be imposed upon any voter.

(n) No discrimination shall be made in Guam against any person on account of race, language, or religion, nor shall the equal protection of the laws be denied.

(o) No person shall be convicted of treason against the United States unless on the testimony of two witnesses to the same overt act, or in confession in open court.

(p) No public money or property shall ever be appropriated, supplied, donated, or used, directly or indirectly, for the use,

benefit, or support of any sect, church, denomination, sectarian institution, or association, or system of religion, or for the use, benefit, or support of any priest, preacher, minister, or other religious teacher or dignitary as such.

(q) The employment of children under the age of fourteen years in any occupation injurious to health or morals or hazardous to life or limb is hereby prohibited.

(r) There shall be compulsory education for all children, between the ages of six and sixteen years.

(s) No religious test shall ever be required as a qualification to any office or public trust under the government of Guam.

(t) No person who advocates, or who aids or belongs to any party, organization, or association which advocates, the overthrow by force or violence of the government of Guam or of the United States shall be qualified to hold any public office of trust or profit under the government of Guam.

(u) The following provisions of and amendments to the Constitution of the United States are hereby extended to Guam to the extent that they have not been previously extended to that territory and shall have the same force and effect there as in the United States or in any State of the United States: article I, section 9, clauses 2 and 3; article IV, section 1 and 2, clause 1; the first to ninth amendments inclusive; the thirteenth amendment; the second sentence of section 1 of the fourteenth amendment; and the fifteenth and nineteenth amendments.

All laws enacted by Congress with respect to Guam and all laws enacted by the territorial legislature of Guam which are inconsistent with the provisions of this subsection are repealed to the extent of such inconsistency.

48 U.S.C. 1424-2.

The relations between the courts established by the Constitution or laws of the United States and the local courts of Guam with respect to appeals, certiorari, removal of causes, the issuance of writs of habeas corpus, and other matters or proceedings shall be governed by the laws of the United States pertaining to the relations between the courts of the United States, including the Supreme Court of the United States, and the courts of the several States in such matters and proceedings: Provided, That for the first fifteen years following the establishment of the appellate court authorized by section 1424-1(a) of this title, the United States Court of Appeals for the Ninth Circuit shall have jurisdiction to review by writ of certiorari all final decisions of the highest court of Guam from which a decision could he had. The Judicial Council of the Ninth Circuit shall submit reports to the Committee on Energy and Natural Resources of the Senate and the Committee on Interior and Insular Affairs of the House of Representatives at intervals of five years following the establishment of such appellate court as to whether it has developed sufficient institutional traditions to justify direct review by the Supreme Court of the United States from all such final decisions. The United States Court of Appeals for the Ninth Circuit shall have jurisdiction to promulgate rules necessary to carry out the provisions of this subsection.

48 U.S.C. 1424-3.

(a) Appellate jurisdiction of District Court:

Prior to the establishment of the appellate court authorized by section 1424-1(a) of this title, the District Court of Guam shall have such appellate jurisdiction over the local courts of Guam as the legislature may determine. Provided, That the legislature may not preclude the review of any judgment or order which involves the Constitution, treaties, or laws of the United States, including this chapter, or any authority exercised thereunder by an officer or agency of the Government of the United States, or the conformity of any law enacted by the legislature of Guam or of any orders or regulations issued or actions taken by the executive branch of the Government of Guam with the Constitution, treaties, or laws of the United States, including this chapter, or any authority exercised thereunder by an officer or agency of the United States.

I. The petition for certiorari should not be granted because Congress has not indicated that deference should be granted to the decisions of local courts regarding Guam's Bill of Rights.

Petitioner would have the determinations of the District Court of Guam Appellate Division accorded "deference" by higher courts, insofar as those determinations concern application of the "Guam Bill of Rights" specified in 48 U.S.C. 1421b(a-t), the section of the Organic Act[1/] establishing a Bill of Rights for Guam. In so doing, the petitioner would have 48 U.S.C. 1421b(a-t) regarded as if it were a state constitution, and the District Court of Guam, Appellate Division regarded as if it were a State Supreme Court, interpreting personal rights provisions of a state constitution. However, there is actually no support for such a construction in either law or policy. The

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1/ Congress, in enacting Chapter 8A, Title 48, provided by Section 1 of the Act, August 1, 1950, that it should be popularly known as the "Organic Act of Guam."

deference doctrine is court doctrine applying to interpretation of local territorial laws whereas the interpretation of federal laws involves ascertainment of the intent of Congress. Congress has not manifested an intent that the interpretations of the Organic Act, a federal law, be reviewed deferentially.

Petitioner refers to cases prescribing deference to territorial court's interpretation of local laws, citing Diaz v. Gonzales, 261 US 102 (1923), De Castro v. Board of Commissioners of San Juan , 322 US 451 (1944), and Schenck v. Government of Guam, 609 F.2d 387, (9th Cir. 1979). However, respondent must point out that the local laws, customs or policies which have been accorded deference under this doctrine have local origins. The Organic Act is an enactment of U.S. Congress, and determinations of its meaning involve ascertaining

the intent of Congress. The Ninth Circuit and U.S. Supreme Court are as well qualified to ascertain the intent of Congress as the District Court, Appellate Division, if not more so. Hence, there is no reason why the former should defer to the determinations of the latter, insofar as there is no interest favoring local interpretation of the Organic Act which would be vindicated.

In fact, the Court has stated that the deference doctrine does not apply where U.S. statutes are involved. In De Castro, supra, the court stated: "Repeated admonitions that in cases coming from the Puerto Rican insular courts to the federal courts for review, where the Constitution or statutes of the United States were not involved, great deference must be paid to local decisions having failed of their purpose, see Bonet v. Yabucoa Sugar Co., 306 U.S. 505, 307 U.S. 613, 59 S.Ct. 626, 83 L.Ed 946, we restated

them in more emphatic form in Bonet v. Texas Company, supra, 308 U.S. 470, 60 S.Ct. 353, 84 L.Ed 401, in the sentence quoted in the opinion below which is repeated here." 322 U.S. at 457-458. (emphasis supplied.)

Hence, the Court has excluded statutes of the United States from the ambit of the deference doctrine. It applies only to matters of purely local law. Gumataotao v. Gov't. of Guam, 322 F.2d 580, 582 (9th Cir. 1963). Insofar as the Organic Act is a statute of the United States, local court interpretations of that Act should not be accorded deference.

Likewise, there is no basis for analogizing interpretation of rights under the Organic Act to interpretation of state constitutional provisions. Neither the inception of the Organic Act nor the creation of the District Court, Appellate Division expressed the will of a sovereignty apart

from the United States. Instead, the creation of both was an expression of the will of Congress. Although the Organic Act and the District Court, Appellate Division were created for Guam, they were not created by Guam. Hence, whatever degree of deference should be accorded the determinations of the District Court, Appellate Division is wholly within the control of Congress; Guam has no power which is not exercised at the sufferance of Congress. Rodriguez v. Gaylord, (1977 DC Hawaii) 429 F.Supp 797.

The courts have recognized that Congress exercises plenary power over Guam's judicial system. Article IV, Section 3 of the Constitution gives Congress plenary power over territories of the United States. Late Corporation of Latter Day Saints v. United States, 136 US 1, 32, (1890). Guam, as an incorporated territory, 48 U.S.C. §1421a (1976) is subject to this plenary power,

Agana Bay Development Co. (HongKong), Ltd. v. Supreme Court of Guam, 529 F.2d 952, 954 (9th Cir. 1976). Congress has the power to legislate directly for Guam, or to establish a government for Guam subject to Congressional control. Except as Congress may determine, Guam has no inherent right to govern itself. See First National Bank of Brunswick v. County of Yankton, 101 US 129, 133, (1880).

Hence, in Guam v. Okada, 694 F.2d 565 (9th Cir. 1982) the court held that Guam, possessing no inherent sovereignty of its own, could not authorize appeals to federal courts, as can a sovereign state. See e.g., Arizona v. Manypenny, 451 U.S. 232 (1981).

Indeed, it appears that Congress has prohibited by statute the kind of deferential review of decisions involving the Organic Act's Bill of Rights (48 U.S.C. 1421b(a-t)) which petitioners are seeking.

48 USC 1424-3(a), Pub. L. 98-454, Title VIII, §801, 98 Stat. 1743, was added to the Organic Act on October 5, 1984, along with other provisions which, inter alia, authorize the Guam Legislature to establish an appellate court.

48 U.S.C. 1424-3(a) provides:

> Prior to the establishment of the appellate court authorized by section 1424-1(a) of this title, the District Court of Guam shall have such appellate jurisdiction over the local courts of Guam as the legislature may determine: Provided, That the legislature may not preclude the review of any judgment or order, which involves the Constitution, treaties, or laws of the United States, including this chapter, or any authority exercised thereunder by an officer or agency of the Government of the United States, or the conformity of any law enacted by the legislature of Guam or of any orders or regulations issued or actions taken by the executive branch of the Government of Guam with the Constitution, treaties, or laws of the United States, including this chapter, or any authority exercised thereunder by an officer or agency of the United States. (emphasis supplied).

The Guam Legislature has not yet established the court referred to by this section. This section does however, clarify the grant of power to the Legislature to regulate the appellate jurisdiction of the District Court of Guam, by stating Congress did not contemplate legislative restriction of appellate review of cases involving the "Constitution treaties, or laws of the United States, including this chapter [Organic Act]."

The prohibition on legislative action precluding review of decisions involving the Organic Act should prohibit courts from adopting a deferential standard of review as well, insofar as a deferential standard of review under the deference doctrine would permit an appeal court to overturn a lower court's decision only in cases of clear and manifest error. Bonet v. Texas Co., Inc., 308 U.S. 463, 471, (1940). Hence, it was the intent of Congress to prohibit the kind

of deferential review of a judgments under the Organic Act which petitioners are seeking. Indeed, the Congressional amendments (Omnibus Territories Act of 1984, Pub.L. 98-454, Title VIII §801-803, 98 Stat. 1742) permitting the creation of local appellate courts indicate that "state court" status should be afforded only after Guam has created its appellate court locally, and not before.

In Guam v. Olson, 97 S.Ct. 1774, (1977) the U.S. Supreme Court was required to undertake the same kind of examination of Congressional intent as is required in this case. In that case, the Court construed the Organic Act to the effect that the Guam Legislature could not divest the District Court of its jurisdiction to hear appeals from local Guam Courts and to transfer that jurisdiction to the newly created Guam Supreme Court. The issue in Olson was

whether the power of the District Court Appellate Division could be circumscribed.

In Olson, the Supreme Court reviewed the legislative history of the Organic Act and found no evidence of intent to put certain controversies beyond review by the federal court system. 431 U.S. at 202-203. The court likewise noted that Congress has consistently provided for appellate review by Article III courts of decisions of local courts of the other Territories. "What history there is points to a purpose to create a similar system for Guam. Hearings, supra; S. Rep. No. 2109, 81st Cong., 2d Sess. (1950). We are unwilling to say that Congress made an extraordinary exception in the case of Guam, at least without some clearer indication of that purpose than the word 'determine' provides." 431 US at 204.

The conclusions of the Court in Olson are equally applicable to this case: inasmuch as there was no evidence of intent of

Congress to circumscribe the powers of the District Court, Appellate Division, there is equally no evidence of intent to enhance the powers of the District Court, Appellate Division at the expense of higher courts.

For that matter, the District Court, Appellate Division is not truly a local court. It draws it powers from no local sovereignty. Instead, it draws its powers from Congress - §22A of the Organic Act. Although Congress could have made the District Court, Appellate Division the court of last resort for appeals of determinations under the Organic Act, it has not done so. Instead jurisdiction over appeals on these questions is granted to the Ninth Circuit and this Court. Respondents believe that Congress must clearly signal it's intention to foreclose review by higher courts before such review may be limited.

In Olson, the Court found dispositive

the fact that the action of the Guam Legislature divesting the District Court of its appellate jurisdiction would deprive litigants before the territorial courts of the opportunity of review by Article III courts.

The Court concluded that absent an expression of intent by Congress, review may not be forestalled, stating:

"First, we should be reluctant without a clear signal from Congress to conclude that it intended to allow the Guam Legislature to foreclose appellate review by Article III courts including this court, of decisions of territorial courts in cases that may turn on questions of federal law." 97 S.Ct. 1778.

Therefore, the fact that deferential review would deprive judgments of full review by Article III courts is a strong indication that absent evidence of Congressional intent to the contrary, no such review was intended by Congress, or should be imposed by the

court. See also 48 U.S.C. 1424-2. (48 U.S.C. 1424-2, Pub.L 98-454, Title VIII, §801, 98 Stat. 1742, enacted after Olson, indicates that relations between Article III courts and territorial courts shall be identical to relations between Article III courts and state courts.)

Thus, whereas the deference doctrine is a court doctrine applying to interpretation of local laws, the interpretation of the Guam Bill of Rights involves ascertainment of Congressional intent. Congress has not manifested an intent that interpretations of the Organic Act, a federal law, be reviewed deferentially.

II. Congress, in extending protection of the U.S. Constitution to Guam, made allowance for the fact that Guamanians already enjoyed some personal rights. As a consequence, the due process guarantee extended by 48 U.S.C. 1421b(u) is not duplicative of the due process language of 48 USC 1421b(e).

Petitioner bases his argument on the

fact that 48 USC 1421b(e), and the subsequently enacted 48 U.S.C. 1421b(u), both contain provisions proscribing deprivations without due process of law. Petitioner argues that the due process rights provided under 48 USC 1421b(e) should be separately interpreted based on the apparent duplication, stating that Guam's separate Bill of Rights must have some effect or it would not have been enacted.

However, section 48 USC1421b(u) provides that the provisions of the U.S. Constitution are extended to Guam "to the extent they have not been previously extended to the territory".

The inclusion of this language indicates Congress awareness that Guamanians already enjoyed some of the rights extended by 48 USC 1421b(u) at the time of that statutes enactment.

Hence, petitioners argument that Congress intended that the Guam Bill of

Rights be separately interpreted by providing duplicative language is without merit, insofar as there is no duplication.

III. Assuming, for the purposes of argument, that Congress had intended that the Guam Bill of Rights be interpreted differently from the U.S. Constitution, Congress by the enactment of 48 USC 1421b(u) expressly repealed any such interpretations.

48 U.S.C. 1421b(u) provides, inter alia:

"All laws enacted by Congress with respect to Guam, and all laws which are inconsistent with the provisions of this subsection are repealed to the extent of such inconsistency".

48 U.S.C. 1421b(u) extended the federal constitutional protections of personal rights to Guam with the "same force and effect there as in the United States or in any State of the United States". Therefore, insofar as Congress by the enactment of Guam's Bill of Rights may have intended more expansive readings of those rights than under the

federal constitution, that intent was repealed by 48 USC 1421b(u).

Hence, the Ninth Circuit's conclusion that "the Guamanian due process guarantee has been identified with the federal guarantee by statute." People v. Fegurgur, 800 F.2d 1470, 1473 n.3 (9th Cir. 1986). By use of the word "identified" the Ninth Circuit meant to say that 48 USC 1421b(u) rendered inconsistent any interpretation of the Guam Bill of Rights not in accord with the federal constitution. In other words, the Ninth Circuit said that 48 USC 1421b(u) conformed the guarantee of due process in the Guam Bill of Rights to the federal constitution.

Therefore, it is evident that Congress meant to bar any interpretations of the due process phraseology inconsistent with how identical language in the second sentence of the Fourteenth Amendment had been interpreted.

IV. The Court, in this case, is required to determine Congress' intent, insofar as both 48 USC 1421b(e) and 48 USC 1421b(u) are Congressional acts. Legislative intent relative to the enactment of the Organic Act in 1950 indicates that Congress "modeled" the Bill of Rights contained therein on the federal constitution; hence, federal interpretations of those rights are appropriate to effectuate Congressional intent.

The Senate Committee on Interior and Insular Affairs, in its Senate Report No. 2109 dated July 20, 1950, said:

> "Section 5: Provides for a bill of rights granting the Guamanians protection against infringement of personal freedom. The bill of rights is modeled upon the Bill of Rights in the United States Constitution but does not expressly provide for trial by jury in Guam "S.Rep. No. 2109, 81st Cong. 2nd Sess 1, reprinted in 1950 U.S. Code Cong. & Ad News 2854, quoted in United States v. Seagraves, 100 F.Supp 424, 425 (D.Guam 1951) and Hatchett v. Government of Guam, 212 F.2d 767, 771 (9th Cir. 1954).

Insofar as the language of the second sentence of the Fourteenth Amendment and 48 USC 1421b(u) are identical, and it was the

intent of Congress to "model" the Organic Act's Bill of Rights on the Bill of Rights in the federal constitution, it would seem that Congress would have intended that rights under 48 USC 1421(a-t) be interpreted the same as federal rights.

CONCLUSION

For the foregoing reasons, the petitioners' petition for certiorari should be denied.

Dated, Agana, Guam,

February 20, 1987.

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